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CONTENTS

ARTICLES

- Muddling in the Quicksands of Tradition and Custom and Skating Down the Slippery Slopes of Modernity: The Reform of Marriage and Inheritance Laws in Zimbabwe 1
WELSHMAN NCUBE
- Gender and Indigenous Knowledge Systems and Sustainable Development 20
JENNIFER MOHAMED-KATERERE
- Age and Suggestibility Effects in Eyewitness Testimony 27
PATRICK CHIRORO AND MGCINI SIBANDA
- The Demise of the Remedy of Reinstatement in Employment Contracts 40
LOVEMORE MADHUKU
- Security of Employment in the Public Service in Botswana: A Synopsis 45
KHOLISANI SOLO
- Shareholders' Rights in Zimbabwe 52
LOVEMORE MADHUKU
- Observations on the Observance of Administrative Law in University Students Disciplinary Proceedings: A Survey of Selected Universities in Southern Africa 66
CHARLES GOREDEMA
- An Agenda for Constitutional Reform 79
OAGILE KEY DINGAKE
- The Quest to Consign Apartheid to the Dustbin of History: Procedural Human Rights in Criminal Justice in the Final Constitution of South Africa 88
CHARLES GOREDEMA
- Towards the Constitutional Protection of Environmental Rights in Zimbabwe 97
WELSHMAN NCUBE, JENNIFER MOHAMED-KATERERE AND MUNYARADZI CHENJE
- HIV/AIDS, Human Rights, Ethics and the Media in Botswana 133
OAGILE KEY DINGAKE

HIV/AIDS, HUMAN RIGHTS, ETHICS AND THE MEDIA IN BOTSWANA

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ABSTRACT

The focus of this article is human rights, ethics and the media in the context of the challenges posed by HIV/AIDS. Its basic premise is that an effective HIV/AIDS prevention programme cannot succeed if it is not aided by the media that is conscious of the human rights dimension of the epidemic. The paper argues that stigmatisation and discrimination of persons with HIV/AIDS should be rejected as prejudicial to health, for the simple reason that such discrimination would force people with HIV to go underground and in the worst case scenario, could lead to deliberate transmission of the virus as a reaction to societal hostility.

GENERAL INTRODUCTION

HIV/AIDS was first diagnosed in Botswana sometime in 1985. By 1996 about 180 000 people were suspected to be HIV positive, out of a population of 1.3 million. It is projected that there will be 332 000 people infected with HIV in Botswana by the end of the century. The number of people infected with HIV increased from 59 000 in 1992 to 180 000 by 1996. A total of 3620 AIDS cases was reported to the AIDS/STD Unit during the first quarter of 1996.

AIDS is a syndrome involving opportunistic diseases. It is ultimately fatal. It is triggered by a virus that diminishes and eventually destroys the human body's defence system.¹ Medical opinion is almost unanimous that HIV/AIDS can be passed from one person to another only in body fluids,² principally blood or semen and principally through penetrative sexual intercourse, skin cuts, injection with infected blood and in the uterus of a pregnant woman.

The impact of the HIV/AIDS epidemic to the development of Botswana, must be understood in the context of the critical social and economic problems the country is experiencing at the moment, which *inter alia* includes low productivity, poverty and the subordination of women. The social and economic impact of HIV/AIDS manifests itself in the depletion of the labour force and the resultant low productivity at the workplace. The cost in human pain, suffering and grief is incalculable. The monetary costs (preventative and research expenditure as well as morbidity and mortality costs) will impact negatively on our development efforts.

The challenge for policy makers and the media practitioners as the watchdogs of the nation and the protector of the weak is to promote humane ways of dealing with people with HIV/AIDS that is underpinned by respect of fundamental human rights. The public misapprehension of HIV/AIDS, has at times caused unnecessary hysteria and insecurity that has often led to unwarranted discrimination of people with HIV/AIDS. The press has

1 See Laura D. Estrin, 'Hospitals and AIDS Discrimination' (1990) 6 *Journal of Contemporary Health Law and Policy*.

2 HIV/AIDS cannot be contracted through hugging, shaking hands and sharing toilet seats.

an obligation to clear this misapprehension through systematic public education. HIV/AIDS is best tackled in a non-discriminatory way.

This paper focuses specifically on the role of the media.

THE CONSTITUTIONAL CONTEXT

HIV/AIDS is not only a health issue, it is also a human rights issue, which requires innovative and creative legislative enactments that can provide a broad and flexible framework within which to deal with the epidemic. In the process, we will need to deal boldly with many legal and ethical issues that may arise. Botswana has no specific legislation dealing with HIV/AIDS. Consequently, guidance on this matter can be sought from the constitution³ and the common law.

Botswana is a sovereign republic with a written constitution that is supreme.⁴ The constitution entrenches fundamental human rights and freedoms.⁵ These rights include among others the right to privacy, liberty, human dignity, equal protection of the law and prohibition against discrimination. Discrimination on the basis of race, colour, creed and political opinion is expressly prohibited. The fact that S15 which prohibits discrimination has omitted to mention sex,⁶ or medical condition does not necessarily mean discrimination on those grounds will be permitted. Discrimination that is irrational and unfair will not be accepted.⁷

Human Rights are inherent in men and women. They are not given by the State. The State is bound to recognise them. Consequently, Human Rights are non-negotiable. The fact that they are not negotiable does not mean that they are absolute. No right is absolute. Consequently, fundamental human rights are generally qualified in the interests of defence, public safety, public health and public morality.⁸

The effect of these qualifications therefore is that Human Rights can be restricted in the interest of public health or to protect the rights of others. The constitution makes it clear that the restrictions must be prescribed by law (i.e. should not be arbitrary) and must be justified in a democratic society.⁹ Further, it is important that the restriction must be proportional to the aim sought to be achieved and be the least restrictive means available. In this regard, it has been observed by some United Nations Agencies that "restrictions on Human Rights in the context of HIV/AIDS do not achieve the aim of public health and often are neither proportional nor the least restrictive means available".¹⁰

The HIV/AIDS pandemic, as it is often described, has implications for all human rights, but its immediate impact is on the right to life, which is entrenched in the Botswana constitution. The right to life, in our view, obliges the state to take all necessary measures to protect human life. Consequently any action which restricts an individual's ability to

3 See S15 of the Constitution of Botswana.

4 This means that all the laws must comply with the constitution.

5 See Section 9(1) of the *Constitution of Botswana*.

6 See the ground breaking decision of the Court of Appeal in the case of *Unity Dow vs the Attorney General Civil Appeal No. 4 of 1991*.

7 *Ibid.*

8 See Section 9(1) of the *Constitution of Botswana*.

9 S 9(1) (d) (note) 89.

10 See UNAIDS Briefing 9-13 December (1997) p.9.

protect himself or herself from contracting HIV / AIDS contravenes this fundamental human right.¹¹ The nature of Botswana's legal system requires that all statutory laws must comply with the constitution.¹² The courts will declare any Act of Parliament that is inconsistent with the Constitution invalid to the extent of its inconsistency.¹³

A SYNOPTIC REVIEW OF THE PERTINENT HUMAN RIGHTS IN THE BOTSWANA CONSTITUTION

The rights guaranteed in the constitution of Botswana are guaranteed to all human beings regardless of race, place of origin, colour, creed, or political opinion, including people infected with HIV / AIDS. Those rights are only subject to respect of freedoms of others and public interest.¹⁴

The Right To Life¹⁵

The right to life includes the right to live in dignity, freedom and safety. Section 3 which guarantees the right to life must be read with S7 of the constitution which prohibits subjecting any person to inhuman or degrading treatment. It need not be emphasised that one does not cease to be a human being because he/she is infected with HIV / AIDS.

The Right to the Security of Person and Protection of Law¹⁶

HIV / AIDS infected persons are entitled to live in dignity and their safety must be guaranteed. Their right to security will be invaded if they are discriminated and treated like objects. They are, like all other persons, entitled to full and equal protection of the law. HIV / AIDS infected persons have the right to seek redress from the courts for the violation of their rights.

The Right to Privacy¹⁷

The right to privacy is meant to protect the dignity of persons, including their honour and reputation. Any violation of the right to privacy must be compellingly necessary and justifiable in a democratic society. Confidentiality of information relating to an individual with HIV / AIDS is protected under this right. Individuals have the right to keep confidential information which is highly personal, which, if disclosed, may be harmful to them.

The Right To Personal Liberty¹⁸

The right to personal liberty, in our view, includes the freedom to bodily integrity and freedom of choice. Individuals have the right to make choices and decisions about their bodies, as long as they don't infringe on the rights of others.

11 See S3 (note) 8.

12 See S 86 (note) 8.

13 See the case of *Unity Dow* (note) 6.

14 S 3 (note) 8.

15 *Ibid.*

16 *Ibid.*

17 *Ibid.*

18 S.5 (note).

The foregoing rights are guaranteed to every human being, including those with HIV/AIDS. These rights cannot be restricted, unless in compliance with the constitution and any other laws. However, neither could the rights of other persons, who are exposed to the possibility of infection be sacrificed in the process of trying to protect the rights of those infected.

ETHICAL CONSIDERATIONS THAT ARE RELEVANT IN DEALING WITH THE HIV/AIDS SCOURGE

Confidentiality

In terms of medical ethics, a doctor owes his patient absolute secrecy on all matters that come to him/her in his/her capacity as a doctor. It is improper for a doctor to disclose to third parties, unless compelled to do so by statute, information that is confided to him/her by the patient. It must be noted however that ethics do not have any binding legal effect and can be easily overridden by specific legislative enactment.

Obligation to Treat

Ethically, a doctor or health professional must treat to the best of their ability, all persons seeking their medical attention without discrimination whatsoever. Medical doctors are further bound, ethically and by law, in an appropriate case, to seek the consent of the patient before testing patients for HIV/AIDS. As a general rule the patient is a master of his or her life and body. Consequently the decision whether to submit to HIV tests lies with the patient not the doctor. Failure by the doctor to seek consent of the patient, would constitute a violation of the patient's bodily integrity and the right to privacy.

A Legal Minefield — The Case of HIV Testing

Whether or not testing would infringe upon fundamental human rights will depend on the circumstances of each case and the interpretation of the law in question. In Botswana, there is no public legislation that deals specifically with HIV/AIDS. The existing Public Health Act, although dealing with infectious diseases in general, is inadequate. For instance it is not clear whether AIDS is a notifiable disease or not. A careful reading of the Act makes it doubtful whether it is indeed so. Apparently coded test result reporting is collated at the STD/AIDS Unit of the Ministry of Health. Reporting is relatively comprehensive, although the possibility of under-reporting is there.¹⁹

It is possible that mandatory testing may infringe against the right to privacy. The National Policy on AIDS does not permit mandatory testing. At the workplace generally, three arguments have been advanced against pre-employment testing. These are:

- (i) That pre-employment testing does not guarantee an AIDS free workforce.
- (ii) That pre-employment testing encourages stigmatisation and ostracisation.
- (iii) That a person who tests HIV positive may still be capable of performing his/her duties.

Testing at the workplace is made unnecessary by the fact that it is very unlikely for a person to transmit AIDS at work because AIDS transmission is sexual or blood borne and

19 The Permanent Secretary in the Ministry of Health Dr. Mulwa remarked at the Consultative Conference held in Francistown, 5-6th June 1997 that the current infection levels of HIV/AIDS may be an under-estimation.

not casual. Constitutionally a person with HIV / AIDS has a right to bodily integrity, privacy²⁰ and freedom of choice and equal protection of the law.²¹

PROPOSED CODE OF ETHICS FOR REPORTING HIV/AIDS

Journalists have their general code of conduct that enjoins them, among other things, to defend the truth. In the era of HIV / AIDS, it is important that they must have a special code of conduct specifically dealing with reporting HIV / AIDS. This code of ethics' basic premise of departure must be the need for all journalists to be equipped with the basic medical facts about HIV / AIDS. Only when journalists are knowledgeable can they engage in the task of informing the public. This basic understanding should include commonly used terminologies related to HIV / AIDS such as 'mortality' 'morbidity' and 'epidemiology'. Journalists should be aware that terms such as victims and patients are best avoided because they tend to demean those affected. The right of the media to information must always be balanced with the right to privacy. The proposed code of ethics does not in any way suggest that journalists should not report on HIV / AIDS but only that they must always be sensitive to the rights of those persons who have HIV / AIDS.

THE WAY FORWARD

The media can play a very important role in influencing public opinion and stimulating debate. It is important to work out strategies that will fully utilise the media to promote HIV / AIDS prevention and encourage attitudes that are conducive to an effective HIV / AIDS prevention programme. Some of these strategies may include:

- (i) mobilisation of the media to support and initiate appropriate and effective HIV / AIDS awareness and care;
- (ii) the need to target the media personnel continuously and arm them with the latest information on HIV / AIDS to enable them to provide accurate and up-to-date reporting;
- (iii) the media should in particular be encouraged to shun information that encourages stigmatisation and discrimination and government and non-governmental organisations dealing with HIV / AIDS must be encouraged to brief the media regularly on the latest figures and research findings on HIV / AIDS.

In South Africa, consideration is being given to inviting journalists to become members of the AIDS Legal Network. It is hoped that by so doing journalists will be sensitized to the correct terminology to be used in reporting.²² It is also hoped that other initiatives may include the targetting of Universities and Colleges which train future journalists.²³

There is also an urgent need to attend to the area of legislation which is lagging behind. The Constitution of Botswana and the Public Health Act were formulated to address the needs of a given time. Quite clearly they were formulated at a time when the AIDS scourge had not arisen.²⁴ Both legal instruments must be amended to accommodate legal dilemmas

20 See Section 3 of the *Constitution*.

21 *Ibid.*

22 See Newsletter of the African Network on Ethics, Law and HIV June 1997 p7.

23 *Ibid.*

24 See Oagile Key Dingake 'HIV / AIDS' at the Workplace' an unpublished paper presented at the Conference of Business Coalition against AIDS, 14th May 1997, Botswana National Productivity Centre.

that are posed by the epidemic. In particular, circumstances under which testing for AIDS can be undertaken needs to be outlined in detail. Further, it has now become necessary to outline exceptions to the principle of confidentiality. Most importantly, a provision dealing with partner notification is needed in the Public Health Act. Partner notification is not currently required by law.

CONCLUSION

Writing in ways that promote fundamental human rights of persons living with AIDS will help ensure an effective AIDS prevention programme. Misapprehensions, hysteria, phobia and bigotry provide a fertile ground for unwarranted discrimination. Discrimination has the potential to undermine national efforts at arresting the spread of AIDS. This discrimination itself can endanger public health. In order to combat HIV/AIDS it is important that ignorance be combated with basic medical facts about HIV/AIDS and that all persons who are in influential positions be armed with knowledge of the human rights dimensions of the epidemic.



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